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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARYETTA CHRISTINA MARKS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B157962 (Los Angeles County Super. Ct. No. BC 228619)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.

MaryEtta C. Marks, in pro. per., for Plaintiff and Appellant.

Goldstein, Kennedy & Petito, Charles H. Goldstein, Deborah H. Petito and Douglas H. Hoang for Defendants and Respondents.

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Appellant MaryEtta Christina Marks, a former deputy public defender,[1] appeals from summary judgment in favor of her former employer, County of Los Angeles, and several county employees. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

On April 20, 2000, Marks filed a complaint against the County of Los Angeles (County), the Los Angeles County Public Defender's Office, the Public Defender, Michael P. Judge, and several county employees[2] alleging three causes of action: (1) racial discrimination, (2) harassment, retaliation and discrimination in violation of the Fair Employment and Housing Act (FEHA), Government Code section 12940 et seq.; and (3) violation of the California Constitution, article I, section 8.

Marks, an African-American female over the age of 40, became employed as a deputy public defender in 1987.[3] She alleged that from 1992 to the present, she suffered discrimination on the basis of her age, race and gender, was harassed and retaliated against by respondents, and ultimately forced to resign her position as a Deputy Public Defender II. Although Marks' complaint is difficult to understand, the gist of her allegations is that she repeatedly applied for the position of Deputy Public Defender III (DPD III) and was denied promotion. While her complaint does not make this clear, it appears that the appointment process consists of two components -- a written examination and an appraisal of promotability (AP) score. Marks alleged that beginning in 1992, she

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1 Marks, who has her own law practice, is acting in pro. per. on appeal. She was represented below by Robert Ramsey, Jr. of Ramsey & Price.

2 These remaining individual defendants include Dave Meyers, assistant public defender; Kenneth Greene, assistant public defender; Robert Kalunian, assistant public defender; Melvyn Tannenbaum, bureau chief; Alan Simon, bureau chief; John Brock, head deputy; Ronald White, personnel director; and Ronald Adler, personnel director.

3 Marks turned 40 in January 1995.

began filing appeals of her AP scores and grievances of her performance evaluations, and was reassigned from superior court duties to municipal court duties. Marks apparently resigned from her employment in January 1999.

Motions for Summary Judgment

On November 21, 2001, respondents filed their motions for summary judgment or, in the alternative, summary adjudication. While respondents filed a combined notice and separate statement of 202 undisputed material facts, the County and the individual defendants each filed their own memoranda of points and authorities raising different arguments. In support of the motions, respondents submitted evidence consisting of portions of Marks' deposition testimony, numerous exhibits and 13 declarations, including those of each of the named defendants. Respondents also requested the court to take judicial notice of the Los Angeles County Charter, Civil Service Rules, and the complaint filed by Marks' with the Equal Employment Opportunity Commission (EEOC). This request was eventually granted. After obtaining an ex parte order allowing her to do so, Marks filed a late opposition, response to the separate statement of facts and objections to portions of respondents' declarations. Her evidence consisted of her own declaration, portions of her own deposition testimony, and several exhibits. Marks also requested the trial court to take judicial notice of various documents; the request was ultimately granted only with respect to the Civil Service Rules. Respondents replied to Marks' opposition, and also submitted objections to her declaration and to her response to the separate statement, and rebuttal evidence consisting of additional excerpts from Marks' deposition.

After the hearing date on the motions was twice continued, at least once on Marks' request, on January 24, 2002 the trial court granted the motions. In a lengthy document entitled "Motions for Summary Judgment or, in the alternative, Summary Adjudication," the trial court found that Marks failed to submit "any" admissible evidence "sufficient to create even a suspicion" that her age, race or gender was a motivating factor in the

decisions regarding her promotion, and found that as a matter of law no incidents occurred that would constitute harassment. The trial court also found that Marks' failure to exhaust her administrative remedies barred her FEHA claims against the individual defendants. Judgment was entered on February 29, 2002. This appeal was timely filed.

DISCUSSION

Marks' Failure to Comply with Rules of Court

As an initial matter, we note that Marks' opening brief fails to comply in material respects with the requirements of California Rules of Court, rule 14(a). For example, Marks' brief does not state the nature of the action, the relief sought in the trial court and the judgment appealed from, nor does it state that the judgment is final and appealable. Furthermore, in her summary of the significant facts, the *only* pages of the record Marks cites are to four pages of her unverified complaint. She cites to no *evidence* in the record in her factual summary, despite the fact that the parties' papers on the summary judgment motions comprise 10 volumes of the clerk's transcript. Throughout much of her brief, it is not clear that she claimed discrimination on the basis of race, gender and age. Indeed, nowhere in her brief does she even identify her race or age. Moreover, Marks does not support many of her arguments with citations to the record, as required by rule 14(a).

Although Marks is appearing in pro. per., she is an attorney who worked for more than 10 years as a deputy public defender. "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations. [Citations.] Briefs which do not meet this requirement may be stricken. . . . The problem is especially acute when, as here, the appeal is taken from a summary judgment." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) "Of course, allegations by the parties which are not supported by appropriate reference to the record will be disregarded." (*Millan v. Restaurant Enterprises Group, Inc*. (1993) 14 Cal.App.4th 477, 485.) We are tempted to strike Marks' opening brief and have the authority to do so under California Rules of Court, rule 14(e). Instead, we will

simply disregard those portions of Marks' brief which are not supported by appropriate reference to the record or authority.

Standard of Review

On appeal from a summary judgment we undertake a de novo review of the proceedings below, and independently examine the record to determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334 (*Guz*); *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) The Supreme Court has described our duty as follows: "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom ([Code Civ. Proc.,] § 437c, subd. (c)), and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) *Aguilar* explained, "in moving for summary judgment, a 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.'" (*Id*. at p. 849; Code Civ. Proc., § 437c, subd. (o)(2).)

The Trial Court Properly Granted Summary Judgment

A. Individual Defendants' Motion

As stated above, the individual defendants and the County each filed separate memoranda of points and authorities in support of their motions for summary judgment,

and raised separate arguments. The trial court granted the individual defendants' motion on the ground that Marks failed to exhaust her administrative remedies prior to filing her FEHA claims against them. Marks does not raise this issue in her challenge to the trial court's grant of summary judgment. Indeed, nowhere in her opening brief does she even identify each of the individuals sued. Accordingly, we treat this issue as waived. "Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs' brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see also *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365, 368, fn. 1; *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

B. County's Motion

1. Discrimination

". . . California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment. [Citations.]" (*Guz*, *supra*, 24 Cal.4th at p. 354, fn. omitted.) This test is known as the *McDonnell Douglas* test (*ibid*.), after *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.

"'First, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. The employer then must offer a legitimate nondiscriminatory reason for the adverse employment decision. Finally, the plaintiff bears the burden of proving the employer's proffered reason was pretextual. [Citations.]' [Citation.]" (*Le Bourgeois v. Fireplace Manufacturers, Inc*. (1998) 68 Cal.App.4th 1049, 1058, fn. omitted, quoting *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.)

"[L]ike all other defendants, the employer who seeks to resolve the matter by summary judgment must bear the initial burden of showing the action has no merit. [Citation.] The employer carries its burden if, inter alia, it 'establish[es] an undisputed

legitimate, nondiscriminatory basis for [the employment decision.]' [Citation.] Absent 'substantial responsive evidence . . . of the untruth of the employer's justification or a pretext, a law and motion judge may summarily resolve the discrimination claim.' [Citation.]" (*Le Bourgeois v. Fireplace Manufacturers, Inc.*, *supra*, 68 Cal.App.4th at p. 1058, quoting *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1051 & *University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1039; accord, *Guz*, *supra*, 24 Cal.4th at pp. 357, 362.)

Here, the County presented ample, competent and admissible evidence that it relied on legitimate, nondiscriminatory reasons in not promoting Marks to the position of DPD III. The County submitted evidence that pursuant to mandatory Civil Service Rules, County appointments must be made from the highest band or group of eligible candidates, and that candidates are placed into a particular band based on their AP scores and test exam scores. Only if a band has fewer than five eligible candidates will candidates in the next highest band be considered. During the period in question, Marks placed into an eligible band twice -- in March 1995 and July 1997.

Public Defender Michael Judge, who was responsible for making appointments to the DPD III position, stated in his declaration that he made his selections from the eligible candidates based upon information given to him through the chain of command, including three bureau chiefs, and based upon his own personal knowledge of the candidates' performance. Information received by him from bureau chiefs would include the candidate's start date, time in the current position, time in "Adult" superior court, number of recent felony and misdemeanor jury trials, number of homicide cases assigned and tried, number of strike and serious or violent felonies tried, positions of supervision, including calendar deputy, and any other relevant information. Marks agreed that a primary responsibility of a DPD III is to handle complex felony cases. Judge stated throughout his lengthy declaration that the candidates he promoted, including several other African-American women, were more qualified than Marks based on the information he received and on his own business judgment. Furthermore, the evidence

showed that in the first six years of his tenure as Public Defender, which began in 1994, Judge promoted more African-American females than had been promoted in the six years prior to his appointment.[4] The evidence also showed that a comparable number of candidates over the age of 40 were appointed as those under the age of 40.

In the face of the County's showing of nondiscriminatory reasons for Marks not being promoted, Marks was required to show there was nonetheless a triable issue that her lack of promotion was actually made on the prohibited grounds of her race, age or gender. (Code Civ. Proc., § 437c, subd. (o)(2); *Guz*, *supra*, 24 Cal.4th at p. 360.) Marks failed to do so.

In opposing the motions, Marks relied primarily on her own subjective belief that she was more qualified than the promoted candidates. Her evidence consisted of conclusory and unfounded statements in her declaration that she was denied promotion when other less qualified and less experienced candidates were promoted. But a plaintiff's own subjective view of her own qualifications is irrelevant. (*Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1557.) Moreover, Marks admitted in her deposition that the candidates appointed by Judge to the DPD III position were qualified, she had never seen any other employee's performance evaluation, she did not know what criteria was used to rate her, and she either did not know the candidates who were appointed, did not know their work experience or had never worked with them.

In short, Marks completely failed to bring forward substantial, responsive evidence that the reasons proffered by the County for not promoting her were false or otherwise motivated by discriminatory animus. There is simply no evidence that the County discriminated against Marks on the basis of her race, age or gender. Accordingly,

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[4] Judge also stated in his declaration that he was married to an African-American woman, that in 1998 he "received the Loren Miller award from the John M. Langston Bar Association, a predominately African-American attorneys' association, for my commitment to diversity" and that when he "was a candidate for appointment to the position of Public Defender, I received the support of the Black Woman's Lawyer Association."

the trial court properly granted summary adjudication on Marks' discrimination claim. (See *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1160.)

2. Harassment

Marks spends less than a page of her opening brief arguing that she presented sufficient evidence to create a triable issue of fact on her claim for "hostile work environment" harassment. The only "evidence" she points to is "the encounter with the defendant Brock wherein Plaintiff was summarily removed from her assignment and remained out of a felony assignment for a period of 5 years just as defendant Brock threatened coupled with being denied promotion after promotion *could* establish a hostile work environment." (Italics added.)

In *Reno v. Baird* (1998) 18 Cal.4th 640, 646-647, our Supreme Court held that "commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management." Thus, while such actions may constitute discrimination if motivated by an unlawful intent, they do not constitute harassment under FEHA. (*Ibid*.)

Here, Marks presented no evidence of any conduct by the County outside the rubric of personnel management, i.e., failing to promote her and reassigning her from superior to municipal court. Indeed, Marks admitted that none of her supervisors, including Judge, ever made any derogatory comments about race, age or sex. We therefore conclude that Marks' harassment claim fails as a matter of law. Accordingly, the trial court properly granted summary adjudication on Marks' harassment claim.

3. Constructive Discharge

To support her position that she created a triable issue of fact on her claim for constructive discharge, Marks simply points to her "assertion" that she was discriminated against over a period of seven years. But a mere claim of discrimination by itself is insufficient to prove constructive discharge. (*Drake v. Minnesota Min. & Mfg. Co*. (7th Cir. 1998) 134 F.3d 878, 886.) Moreover, as stated above, Marks failed to create a triable issue of fact on her discrimination claim.

In *Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1251, our Supreme Court stated that to establish a constructive discharge, the employee must plead and prove "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign."

But there is nothing in Marks' declaration or in any other evidence submitted by her showing that she was subjected to working conditions rendering her job so intolerable that a reasonable person in her position would have felt compelled to resign. As the court stated in *Casenas v. Fujisawa USA, Inc*. (1997) 58 Cal.App.4th 101, 115: "Little discussion is needed regarding Casenas's allegations she received an unfair performance evaluation and was not considered for promotion to a management position. As a matter of law, such events do not create intolerable working conditions transforming a voluntary resignation into constructive discharge." "The fact that an employee received a poor performance rating will not support a finding of constructive discharge." (*Soules v. Cadam, Inc*. (1991) 2 Cal.App.4th 390, 401.) Furthermore, a demotion of job level, even when accompanied by a reduction in pay (which did not occur here), does not constitute constructive discharge. (*Ibid*.) The evidence presented by Marks shows nothing more than she resigned her position based on her subjective perception that she was being unfairly treated. But a "'"a feeling of being unfairly criticized . . . [is] not so intolerable as to compel a reasonable person to resign."'" (*Tork v. St. Luke's Hosp.* (8th Cir. 1999)

181 F.3d 918, 919.) We conclude that as a matter of law none of the actions Marks complains of constitute constructive discharge. Accordingly, the trial court properly granted summary judgment on Marks' claim of constructive discharge.

4. Retaliation

Marks complains that as a result of the appeals from her AP scores and the grievances from her performance evaluations that she filed beginning in 1992, the County retaliated against her by failing to promote her to DPD III, reassigning her to different courthouses and requiring her to take one of the promotional examinations in a storage closet.

To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, her employer subjected her to adverse employment action, and there is a causal link between the protected activity and the employer's action. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814.) An adverse employment action "'might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.) "The employment action must be both detrimental and substantial." (*Ibid*.)

Under *Thomas*, Marks' complaints of being reassigned to different courthouses and duties and having to sit for one of the promotional examinations in a storage closet do not qualify as "adverse employment actions." There was no evidence that Marks' reassignments resulted in any decrease in salary or loss of benefits, any change in her title of Deputy Public Defender II, or in significantly diminished material job responsibilities. Even if these actions did qualify as detrimental and substantial adverse employment actions, contrary to Marks' assertion, the County presented evidence of legitimate, nonretailatory reasons. For example, the County submitted a declaration by defendant

Brock that Marks was reassigned from superior to municipal court as a result of deficiencies he perceived in her performance based on his own observations and input from other supervisors. Marks admitted she did not know whether employees of other races, gender or age who requested assignment to felony cases were also not reassigned. With respect to the written promotional examination, the County submitted the declaration of defendant Brown that Marks had asked to take the examination on a later date than it was offered because she would be out of town at her mother's funeral. The County accommodated her request.

Thus, the only conduct by the County that could arguably qualify as an adverse employment action would be the failure to promote Marks to the position of DPD III. But, as discussed above in connection with her discrimination claim, the County proffered legitimate, nondiscriminatory reasons for the decision not to promote her. "At least three types of evidence can be used to show pretext: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics." (*Iwekaogwu*, *supra*, 75 Cal.App.4th at p. 816.) Marks submitted no evidence suggesting any retaliatory pretext. Indeed, she concedes as much in her opening brief by stating that she "could have" provided "comparative evidence" ostensibly in the form of an expert opinion. In the absence of any evidence creating a triable issue of fact as to a retaliatory motive, we conclude that the trial court properly granted summary adjudication on Marks' retaliation claim.

C. Continuance of Hearing

In her final argument, Marks asserts that the trial court should have granted her request for a continuance of the hearing on the motions for summary judgment. This argument is wholly without merit for several reasons. First, Marks points to nowhere in the record where she made a request for a continuance that was denied. Second, our own review of the lengthy record indicates that the court did, in fact, twice continue the hearing, at least once on Marks' request. (It is not clear if the second continuance was

also made pursuant to her request.) Third, Marks does not even *attempt* to explain why she should have been granted a continuance.

DISPOSITION

Summary judgment is affirmed. Respondents to recover their costs on appeal. NOT FOR PUBLICATION.

_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
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